

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Performance Measurements and Standards)	
for Interstate Special Access Services	)	CC Docket No. 01-321
)	
Petition of U S West, Inc., for a Declaratory)	
Ruling Preempting State Commission	)	CC Docket No. 00-51
Proceedings to Regulate U S West's Provision)	
of Federally Tariffed Interstate Services)	
)	
Petition of Association for Local)	
Telecommunications Services for Declaratory	)	CC Docket Nos. 98-147,
Ruling	)	96-98, 98-141
)	
Implementation of the Non-Accounting)	
Safeguards of Sections 271 and 272 of the	)	CC Docket No. 96-149
Communications Act of 1934, as amended)	
)	
2000 Biennial Regulatory Review -)	
Telecommunications Service Quality	)	CC Docket No. 00-229
Reporting Requirements)	
)	
AT&T Corp. Petition to Establish)	
Performance Standards, Reporting)	
Requirements, and Self-Executing Remedies	)	RM 10329
Need to Ensure Compliance by ILECs with)	
Their Statutory Obligations Regarding Special)	
Access Services)	

**REPLY COMMENTS OF AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	2
DISCUSSION	4
I. THE INITIAL COMMENTS ESTABLISH THE ABSENCE OF SUFFICIENT COMPETITION IN INTERSTATE SPECIAL ACCESS SERVICES MARKETS TO DISCIPLINE ILEC PERFORMANCE.....	4
A. A Wide Range of Interest Groups Has Reported the Absence of Alternative Sources of Interstate Special Access Services	4
B. The ILECs Have Not Demonstrated a Level of Special Access Competition Sufficient to Obviate the Need for Service Quality Standards.	8
C. The Commission Should Not Equate its Standard for Granting Pricing Flexibility with Evidence of a Competitive Market.	10
II. END USER CUSTOMERS HAVE BEEN SIGNIFICANTLY HARMED BY THE ILECS' POOR PERFORMANCE IN PROVISIONING INTERSTATE SPECIAL ACCESS SERVICES.	13
III. THE COMMISSION SHOULD ACT TO CURB THE ILECS' UNJUST AND UNREASONABLE ABUSE OF THEIR DOMINANCE IN THE INTERSTATE SPECIAL ACCESS MARKET.	15
IV. THE COMMISSION SHOULD ADOPT THE PERFORMANCE STANDARDS AND ENFORCEMENT PLAN SET FORTH IN THE JOINT COMPETITIVE INDUSTRY PROPOSAL WITH SLIGHT MODIFICATIONS THAT WOULD ADDRESS THE DISTINCT NEEDS OF END USER CUSTOMERS.	17
CONCLUSION	19
APPENDIX 1 (Table)	

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Performance Measurements and Standards for Interstate Special Access Services)	CC Docket No. 01-321
)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies	)	RM 10329
Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services)	

**REPLY COMMENTS OF AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (the “Ad Hoc Committee”) submits these Reply Comments in response to the initial comments filed pursuant to the Notice of Proposed Rulemaking (“NPRM”) in the above-

referenced docket.¹ For the reasons set forth below, the Commission should adopt the interstate special access performance standards and enforcement plan for incumbent local exchange carriers (“ILECs”) set forth in the Joint Competitive Industry Group Proposal,² with slight modifications designed to extend to end-user customers the benefits of improved ILEC provisioning.³

INTRODUCTION AND SUMMARY

Because the ILECs face no meaningful competition in the provision of interstate special access services, they are not accountable to their captive special access customers, regardless of whether those customers are interexchange carriers (“IXCs”), competitive local exchange carriers (“CLECs”), wireless carriers, or end-user customers, such as Ad Hoc’s members. Each of these groups has filed comments in this docket reporting a dearth of alternative sources of interstate special access services and a pattern of poor provisioning by the incumbent providers.

The ILECs have been able to exploit their dominance in the special access market by taking a *laissez faire* approach to provisioning, marked by missed deadlines, protracted delays, and general unreliability. Moreover, the ILECs have shown virtually no appreciation for the material, adverse impact their

¹ *Performance Measurements and Standards for Interstate Special Access Services*, CC Dkt. No. 01-321, Notice of Proposed Rulemaking, FCC 01-339 (released November 19, 2001), 66 Fed. Reg. 63651 (December 10, 2001).

² Joint Competitive Industry Group Proposal, version 1.1 (issued January 18, 2002; filed January 22, 2002) (“Joint Industry Proposal”).

³ As used in these Reply Comments, the term “provisioning” includes ordering, provisioning (*i.e.*, furnishing), maintenance, and repair of interstate special access circuits, unless otherwise indicated.

practices have had on their special access customers, who rely on those services to meet their own business needs or those of their customers.

The ILECs' cavalier attitude toward special access provisioning has spawned numerous complaints by members of the Ad Hoc Committee regarding delays and erratic and costly ILEC provisioning practices. As explained below, such irregularities have inflicted significant financial and operational harm on members of Ad Hoc who purchase special access services directly from the ILECs. Examples of the ILECs' egregious provisioning practices are provided in Section III, below.

The ILECs' unreliable and unpredictable provisioning practices are a symptom of their dominance in the interstate special access market. Their unresponsiveness to customer demand could never last in a competitive market, but this market is anything but competitive. Even in metropolitan service areas ("MSAs") where the Commission has granted Phase II pricing flexibility, the ILECs do not face meaningful special access competition. If they did, they would be unable to charge more for special access in those markets than they do in supposedly less competitive markets, yet this is exactly what they are doing.

The ILECs' persistent failure to meet customers' needs for timely and reliable special access provisioning is unjust and unreasonable under Section 201(b) of the Communications Act of 1934, as amended⁴ (the "Act"). The Commission can and should take action to curb these unlawful practices and insert some measure of reasonableness into the provisioning process.

Because competitive forces are insufficient to discipline the ILECs'

behavior and guarantee just and reasonable ILEC special access provisioning, the Commission should adopt performance standards and enforcement mechanisms for the ILECs. The Ad Hoc Committee supports the adoption of the Joint Industry Proposal, with slight modifications tailored to end-user customers, as detailed in Section IV, below. These measures may eventually be unnecessary once the market evolves to the point that competition makes providers more responsive to customers' needs. But until special access customers can "vote with their feet," the ILECs will continue to exploit their dominance and provide sub-standard service to their customers unless the Commission adopts appropriate regulatory incentives for more reliable ILEC provisioning.

DISCUSSION

I. THE INITIAL COMMENTS ESTABLISH THE ABSENCE OF SUFFICIENT COMPETITION IN INTERSTATE SPECIAL ACCESS SERVICES MARKETS TO DISCIPLINE ILEC PERFORMANCE.

A. A Wide Range of Interest Groups Has Reported the Absence of Alternative Sources of Interstate Special Access Services.

As Ad Hoc stated in its initial comments, effective competition has not yet developed in the interstate special access market. Many other parties -- including CLECs, IXC's, and wireless carriers -- have also commented on the ILECs' dominance in the provision of special access services and their own dependence on the ILECs' special access services.⁵ Given the ILECs' continued

⁴ 47 U.S.C. § 201(b).

⁵ See, e.g., Comments of WorldCom, Inc. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("WorldCom Comments") at 9-12; Joint Comments of Time Warner Telecom Corp. and XO Communications, Inc. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("Time Warner/XO Joint Comments") at 4-15; Comments of AT&T Wireless Services, Inc. in CC Dkts.

dominance, CLECs, IXC's and wireless carriers are vulnerable to their discriminatory and unreasonable special access provisioning.

Time Warner Telecom and XO Communications, for example, have identified several factors that force CLECs to purchase the incumbents' special access services.⁶ First, construction of new CLEC facilities may not be an economically viable option in some areas given the projected level of demand that would be required to justify new construction. Second, some landlords impose restrictions and unreasonable demands on companies seeking access to inside wire, the result of which is that only the ILEC has unrestricted access to end users in certain buildings. Third, CLECs must use incumbents' special access services to reach new customers before their own new facilities are constructed.⁷

CLECs are not the only parties to argue that the ILECs are dominant in this market. According to AT&T, IXC's are also "captive customers" of the ILECs' interstate special access services.⁸ In its comments, AT&T noted that the IXC's use interstate special access services to provide traditional long-distance voice services as well as certain advanced services, such as frame relay and ATM.⁹

Similarly, WorldCom stated that it relies on special access to provide:

local exchange service, interexchange service, in-bound toll free service, virtual private networks, dedicated Internet access, frame relay service,

Nos. 01-321, *et al.*, (filed January 22, 2002) ("AT&T Wireless Comments") at 7-9.

⁶ Time Warner/XO Joint Comments at 4-7.

⁷ *Id.*

⁸ AT&T Comments at iv, 3-12.

⁹ *Id.* at 6-7.

ATM service, gigabit Ethernet service, local and wide-area networks, and other voice and data services.¹⁰

Like CLECs, the IXCs maintain that they often have no choice but to purchase special access services from the ILECs.¹¹

Wireless carriers also agree that the special access market is not competitive. According to AT&T Wireless, wireless carriers rely on special access services to connect mobile switching centers with cell sites.¹² AT&T Wireless has said that it has no alternative to ILEC special access services because ILECs “are the only carriers with ubiquitous transport networks that have facilities in place to or near the thousands of locations to which [AT&T Wireless] requires transport.”¹³ Indeed, AT&T Wireless estimates that ILEC special access services account for more than ninety percent of its transport costs.¹⁴

Ultimately, end users bear the brunt of the poor ILEC provisioning and service quality that results from a lack of competitive pressures. As discussed in

¹⁰ WorldCom Comments at 6.

¹¹ Notably, both CLEC and IXC parties indicated that they would prefer to rely on the facilities of competitors because of the poor service quality of the ILECs. For example, the CLEC Focal Communications noted that “[b]ecause of provisioning difficulties, Focal’s practice is always to use third-party facilities wherever possible, and this is true of most other CLECs as well.” Focal, *et al.* Joint Comments at 11-12. Nevertheless, Focal has said it usually has no alternative but to purchase facilities from the ILECs. *Id.* at 12; *see also* WorldCom Comments at 9-10 (noting WorldCom’s policy to use local facilities of WorldCom or other competitive carriers whenever such facilities are available); Comments of Cable & Wireless USA, Inc. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) (“C&W Comments”) at 4 (stating that Cable & Wireless makes use of alternative special access providers whenever possible).

¹² AT&T Wireless Comments at 4; *see also* Comments of VoiceStream Wireless Corp. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) (“VoiceStream Comments”) at 3.

¹³ AT&T Wireless Comments at 7.

¹⁴ *Id.* at 8.

detail in Section II, below, because they have no meaningful alternatives, Ad Hoc Committee members have incurred significant costs and business disruptions as the result of unreliable, erratic ILEC provisioning. Thus, all of the ILECs' customers -- CLECs, IXCs, wireless carriers, and end users -- perceive that the ILECs continue to dominate the interstate special access market.

A recent decision by the New York Public Service Commission (NYPSC) supports this view. Last year, the NYPSC concluded that, even in southern/midtown Manhattan, one of the most competitive local exchange markets in the country, Verizon remains the dominant provider of high-speed facilities.¹⁵ The NYPSC observed that,

[I]n the 132 LATA, . . . Verizon has 8,311 miles of fiber compared to a few hundred for most competing carriers; Verizon has 7,364 buildings on a fiber network compared to less than 1,000 for most competing carriers.¹⁶

The NYPSC found that Verizon controlled 51% of the market in the few blocks making up southern/midtown Manhattan and 88% of the market outside of New York City, making it the dominant Special Services (*i.e.*, access services) provider in New York State.¹⁷

Thus, the overwhelming record evidence in this docket, as well as recent findings of the NYPSC, establish that the special access services market is not

¹⁵ See *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Opinion and Order Modifying Special Services Guidelines for Verizon New York, Inc., Case No. 00-C-2051, Opinion No. 01-1 (June 15, 2001) at 6-10.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 7.

competitive. This conclusion is confirmed by Ad Hoc's showing in its initial comments that the ILECs' special access rates are higher in markets in which Phase II pricing flexibility has been granted than in other, supposedly less competitive, markets. If competitive forces are inadequate to discipline ILECs' special access pricing, they can not discipline the ILECs' provisioning.

B. The ILECs Have Not Demonstrated a Level of Special Access Competition Sufficient to Obviate the Need for Service Quality Standards.

Not surprisingly, the ILECs continue to assert, based on old data, that the special access market is competitive, on the basis of alleged growth in competitively-owned facilities. Despite these claims, the ILECs offer no *new* data, analyses or reports that actually demonstrate the existence of competition in the special access market. Given the perilous financial condition of many of the "competitors" to whom the ILECs point as evidence of a competitive market, the ILECs' arguments are even less persuasive today than they were when they were first raised.

In their comments, SBC, Qwest, Verizon and USTA cite a year-old USTA "Special Access Report" (filed in an earlier docket) as evidence of the extent of special access and high-capacity competition.¹⁸ The Report notes increases in

¹⁸ *Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport*, filed as Attachment B to the *Joint Petition of Verizon, SBC, and BellSouth for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport*, CC Docket No. 96-98 (filed April 5, 2001) ("Special Access Report"); see Comments of SBC Communications Inc. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("SBC Comments") at 8; Comments of Qwest Communications International Inc. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("Qwest Comments") at 7; Comments of the Verizon Telephone Companies in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("Verizon Comments") at 5; Comments of United States Telecom Association in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("USTA Comments") at 2.

(1) the number of route miles of fiber that competitive access providers have deployed, and (2) the revenues that competitors have earned from special access service. The Report also claims that CLECs controlled about 33% of the special access market in 1999 and 36% of the market in 2000.¹⁹

When the ILECs first submitted the Special Access Report, several parties refuted its assertions, arguing that it contained numerous factual errors and methodological problems.²⁰ For example, based on the same data on which the ILECs allegedly relied, Sprint estimated that the CLEC share of the special access market in 1999 was actually 13.9%.²¹ AT&T indicated that the ILECs had relied on data for long-haul fiber, rather than the local facilities used to provide special access services, and that the Commission's own data showed CLECs having, at most, a 21.8% share of that market in 2000.²²

Even when viewed in the light most favorable to the ILECs, the Special Access Report provides evidence only of the *potential* for competition, rather than evidence of *actual* levels of competition. As noted in Section I.A., above, ILECs still control the "last mile" facilities required for access to end users, and

¹⁹ See Special Access Report at 6.

²⁰ See, e.g., Reply Comments of Sprint Corp. in CC Dkt. No. 96-98 (filed April 30, 2001) ("Sprint Local Comp. Rep. Com.") at 3-5 (noting that RBOCs have grossly overstated CLECs' competitive inroads in the special access market); Reply Comments of AT&T Corp. in CC Dkt. No. 96-98 (filed April 30, 2001) ("AT&T Local Comp. Rep. Com.") at 16 (characterizing the Special Access Report as "an evidentiary farce that is not entitled to any weight"); see also AT&T Comments at 10; Comments of Sprint Corp. in CC Dkts. Nos. 01-321, *et al.*, (filed January 22, 2002) ("Sprint Comments") at 4.

²¹ See Sprint Local Comp. Rep. Com. at 4. Sprint also noted that the ILECs had relied on CLEC press releases in calculating fiber route miles and number of buildings served, and that Tier One ILECs' special access revenues nearly tripled between 1996 and 2000. *Id.* at 4-5.

²² See AT&T Local Comp. Rep. Com. at 19-20.

CLECs, IXC, and wireless carriers all remain dependent on special access provided by the ILECs. As WorldCom stated in its comments in this docket,

the incumbent LECs tout the existence of large numbers of competitors from which special access services may be purchased and contend that this proves that they are competitive. Nothing could be further from the truth. Many competitive access providers (CAPs) still depend on the incumbent LECs for access to buildings, as do other competitive providers. Economic and other practical considerations make it impossible for competitors to replicate the ubiquitous reach of the incumbents' networks, and the situation is unlikely to change in the near- or medium- term, if ever.²³

Until new entrants reach special access customers with their own facilities, they will not pose a serious competitive threat to the incumbents; therefore, when analyzing *potential* competition, it is important to consider the ability of would-be competitors to bring their services to their customers.

C. The Commission Should Not Equate its Standard for Granting Pricing Flexibility with Evidence of a Competitive Market.

The ability of new entrants to finance build-outs has been constrained by the downturn in the competitive market. CLECs, once considered "market darlings" on Wall Street, are now scrambling for cash. Competitive carriers' market capitalization, which reflects their ability to finance continued network construction, has plummeted. As the Table in Appendix 1 demonstrates, the average CLEC market capitalization level has declined over 70% since September, 1999, with many players' stock prices having dropped more than 90%.

²³

WorldCom Comments at 3-4.

The ability of competitive carriers to finance the kind of build-out that is required to translate *potential* competitive capabilities into *actual* competition has decreased in step with their market capitalization. Moreover, the poor financial position of many of these “competitors” will limit their ability to raise capital in the future. This recent financial shakeout has all but decimated the industry.²⁴

It is against this current landscape that the Commission’s *Pricing Flexibility Order* of August, 1999,²⁵ must be considered. In that Order, the Commission did not establish a standard for granting pricing flexibility based on a determination that a particular MSA is competitive in the provision of special access services; its standard requires only a determination of *potential* competition based on a minimal threshold of sunk or “irreversible” investment in collocated competitor facilities.²⁶ The threshold is set at a level nowhere near that required for a CLEC to be capable of meeting any given customer’s special access needs. The Commission nevertheless reasoned that the presence of facilities at or above the threshold would “make exclusionary pricing behaviors costly and highly unlikely to succeed.”²⁷ The D.C. Circuit echoed the Commission’s forward-looking view when it upheld the Order, writing that “collocation can reasonably serve as a . . . *predictor* of competitive constraints upon *future* LEC behavior.”²⁸

²⁴ See, e.g., Rebecca Blumenstein, Yocki J. Dreazen, and Shawn Young, “Familiar Ring: How Effort to Open Local Phone Markets Helped the Baby Bells,” *Wall Street Journal*, February 11, 2002, at A1.

²⁵ *Access Charge Reform*, 14 FCC Rcd 14,221 (1999) (*Access Reform Fifth Report and Order*).

²⁶ *Id.* at ¶ 80.

²⁷ *Id.*

²⁸ *WorldCom v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) (emphasis added).

Whatever the wisdom of the Commission's reasoning in the summer of 1999, or the D.C. Circuit's review of that decision approximately a year ago, their predictions of competitive conditions have simply not come to pass.

The Commission's focus in granting pricing flexibility was on a limited amount of collocation in ILEC wire centers, not on miles of CLEC loops or numbers of buildings reached by CLEC facilities.²⁹ Then and now, those figures paint a much bleaker picture of potential competition. For example, as noted above, the NYPSC recently found that non-ILECs' fiber reaches fewer than 15% of the buildings reached by the ILECs' fiber,³⁰ and that is in a LATA commonly recognized as the most competitive in the country!

Building out to customers' premises is far more costly than collocating in wire centers, but without their own transmission facilities to connect to their customers, competitive carriers can only provide special access services by reselling ILECs' services which they purchase at tariffed rates – hardly a formula for meaningful price competition.

The Commission's *Pricing Flexibility Order*³¹ implicitly assumed that the new entrants in Phase II MSAs would either build out transmission facilities to link collocated equipment to customers' premises or be able to negotiate competitive rates for the ILECs' special access services. Both assumptions have proved to be wrong. As noted above, the CLECs have had the financial rug

²⁹ *Id.*

³⁰ *See supra*, note 20.

³¹ *Supra*, note 28.

pulled out from under them since the Commission released the *Pricing Flexibility* Order, bringing their construction projects to a grinding halt. In short, whatever validity CLEC collocation may once have had as a “predictor of competitive constraints upon future ILEC behavior,”³² the fact is that competition has not emerged as predicted. Thus, even in Phase II pricing flexibility MSAs -- the markets in which the Commission found the greatest potential for competitive constraints on ILEC behavior -- new entrants are not now (and do not pose in the near future) a competitive threat to ILEC special access services.

There is no better proof of the lack of competitive constraints than the egregious manner in which the ILECs treat their special access customers.

II. END USER CUSTOMERS HAVE BEEN SIGNIFICANTLY HARMED BY THE ILECS' POOR PERFORMANCE IN PROVISIONING INTERSTATE SPECIAL ACCESS SERVICES.

Members of the Ad Hoc Committee have encountered numerous delays and other provisioning problems when purchasing special access services from the ILECs. These problems -- too numerous to repeat here *verbatim* -- have caused Ad Hoc members to incur significant, though unquantified, costs in additional personnel, business workarounds, and foregone business opportunities.

Members of the Ad Hoc Committee have experienced numerous problems meeting requested due dates, citing Verizon, Qwest, Ameritech, and BellSouth in particular. Members complain that, even if they provide 30 days' notice for circuit requests, carriers continually wait until the last minute to perform

³² *Supra*, note 31.

site surveys, verifications, etc., and then fail to meet service dates, frequently failing even to call customers and tell them so. Members report that they have experienced more delayed system installs and openings of business locations than they can count.

Because of the sheer number of special access provisioning problems Ad Hoc members have reported, a comprehensive listing is impractical. Instead, the following represents a sampling of the types of ILEC provisioning problems Ad Hoc's members have experienced:

- One organization presently has over 100 circuit orders that are past the providers' posted completion dates, some as much as 60-90 days late.
- The same organization has over 550 disconnect orders for which the providers have not given a due date, and 84 additional disconnect orders that are past the providers' posted completion dates.
- Another organization ordered DS3 circuits in April, 2001; the circuits were not installed for 6 months.
- Another order for a DS3 circuit was placed in May, 2001, but not completed until early this year.
- In the words of one Ad Hoc member, "[The] LEC will wait until the very last minute to say the facilities are not available rather than indicate that fact up front. Many times the LEC will assume a disconnect will happen in the meantime to free up facilities and it doesn't happen."
- One Ad Hoc member has been forced to dedicate personnel as order management staff who work through provisioning problems as they arise. The staff must conduct weekly provisioning meetings with providers to avoid serious delays. This level of micro-management imposes a very high cost on end-user customers.
- Although ILECs will give end-user customers a Firm Order Commitment ("FOC") date, occasionally they do not do so until late

in the implementation process and/or when they do, the date turns out unreliable.

- One organization ordered an OC-3 circuit, and the order was not completed for 9 months; the same organization has been told that the lead time for ILEC OC-12 circuits is 6 months.
- One member placed an order for a DS3 circuit, only to cancel it when the ILEC could not provision the circuit in a timely manner. The same member ordered another DS3 circuit in April, 2001, and the circuit was just made available for testing in January, 2002.

The reports of Ad Hoc members regarding substandard ILEC provisioning continue for pages. The costs these organizations have incurred have not been quantified with precision, but estimates are significant. Regrettably, Ad Hoc's members -- like other special access customers who have filed comments in this proceeding -- have no meaningful alternatives to the ILECs' special access services.

III. THE COMMISSION SHOULD ACT TO CURB THE ILECS' UNJUST AND UNREASONABLE ABUSE OF THEIR DOMINANCE IN THE INTERSTATE SPECIAL ACCESS MARKET.

It is unjust and unreasonable under Section 201(b) of the Act for a dominant carrier to exploit its market position by providing sub-standard service and virtually ignoring its customers' business needs and concerns -- as the ILECs have done with respect to their special access customers. The ILECs would never get away with the haphazard provisioning practices in which they have engaged if they faced meaningful competition. But they don't, and they know that their customers have no real alternatives. Consequently, the ILECs have no market-based, economic incentives to be more responsive to their customers' legitimate needs.

In these circumstances, it is appropriate for the Commission to prescribe just and reasonable acts and practices under Section 205(a) of the Act.³³ Indeed, the Commission is *obligated* to prescribe just and reasonable practices in circumstances such as these. As the U.S. Court of Appeals for the D.C. Circuit wrote in *AT&T v. FCC*:³⁴

The FCC has a duty to 'execute and enforce the provisions of' the Communications Act, 47 U.S.C. § 151. The Communications Act requires that common carriers furnish service on reasonable request, 47 U.S.C. § 201(a); [and] that rates and practices be just, fair, reasonable, and nondiscriminatory, 47 U.S.C. §§ 201(b), 202(a) We are aware of no authority for the proposition that the Commission may abdicate its responsibility to perform these duties and ensure that these statutory standards are met.

The Commission has held that, in evaluating the reasonableness of certain dominant carrier acts and practices, "our statutory responsibilities dictate that we take into account the position of the relying customer," which often involves a "balancing of the competing interests of customers and carriers."³⁵ In other words, the assessment of justness and reasonableness under Section 201(b) "involves considerations of fairness to carrier and customer alike."³⁶

Thus, the Commission has a duty to adopt reasonable measures to

³³ *American Telephone and Telegraph Company v. FCC*, 572 F.2d 17 (D.C. Cir.) ("*AT&T v. FCC*"), *cert. denied*, 439 U.S. 875 (1978).

³⁴ *Id.*, 572 F.2d at 24-26.

³⁵ *RCA American Communications, Inc. – Revisions to Tariffs F.C.C. Nos. 1 and 2*, CC Dkt. No. 80-766, Transmittal Nos. 191 and 273, 86 F.C.C.2d 1197, 1201 (released May 26, 1981), *subsequent history omitted* (citing, *inter alia*, *RCA American Communications, Inc.*, 84 F.C.C.2d 781 (1981); *MCI Telecommunications Corp.*, Mimeo No. 25862 (released February 7, 1980), *aff'd*, 81 F.C.C.2d 568 (1980); *Penn. v. ICC*, 590 F.2d 1187 (D.C. Cir. 1978)).

³⁶ *RCA American Communications, Inc. – Revisions to Tariffs F.C.C. Nos. 1 and 2*, CC Dkt. No. 80-766, Transmittal No. 191, 84 F.C.C.2 353, 356 (released December 31, 1980), *subsequent history omitted*.

ensure that ILEC special access provisioning is just and reasonable, and in so doing, the Commission should balance the competing needs of the ILECs and their special access customers. The Commission has before it a proposal that does just that.

IV. THE COMMISSION SHOULD ADOPT THE PERFORMANCE STANDARDS AND ENFORCEMENT PLAN SET FORTH IN THE JOINT COMPETITIVE INDUSTRY PROPOSAL WITH SLIGHT MODIFICATIONS THAT WOULD ADDRESS THE DISTINCT NEEDS OF END USER CUSTOMERS.

Because end-user customers have endured distinct hardships when ILEC provisioning has disrupted customers' schedules or ignored reasonable business needs, and because meaningful alternative sources of special access services do not yet exist, the Commission should adopt performance standards and enforcement mechanisms that will encourage the ILECs to provision special access in a just and reasonable manner that fairly balances the respective needs of carrier and customer.

Achieving parity among ILEC customers, *i.e.*, ILEC affiliates, other carriers, and end-user customers, may address concerns of discrimination under Section 202(a) of the Act, but it would not necessarily achieve just and reasonable provisioning practices that would satisfy Section 201(b).

The Ad Hoc Committee has reviewed the performance standards and enforcement plan set forth in the Joint Industry Proposal, and endorses it, subject to the modifications described below. Although the sponsors of the Joint Industry Proposal have indicated that the measurements, standards, and mechanisms are intended to apply to end-user special access customers as well as to carrier

customers, the members of Ad Hoc generally believe that the measurements, standards, and other mechanisms the Commission adopts should explicitly so provide.

As drafted, the Joint Industry Proposal would address many concerns about unreasonable discrimination in special access provisioning in violation of Section 202(a). This alone would be of some benefit to Ad Hoc's members, as any improvement in special access provisioning should ultimately benefit end users. If, however, the Joint Industry Proposal were modified pursuant to Ad Hoc's suggestions below, it would also address Ad Hoc members' concerns about unjust and unreasonable ILEC provisioning practices under Section 201(b), and would more directly protect end users who purchase ILEC special access services.

Thus, the Joint Industry Proposal should be modified as follows prior to adoption:

1. The proposed performance measurements, standards, and enforcement mechanisms should explicitly apply to *end user special access customers*, as well as carrier customers. For example, the concept of the "CLEC or IXC Carrier Requested Due Date" ("CRDD") in JIP-SA-3 (Offered Versus Requested Due Date) should be changed to "Customer Requested Due Date" to encompass due dates requested by end-user customers, as well as carrier customers.
2. Pinpointing the source of delays *not caused by the ILEC* should make other providers more accountable, and further aid in the diagnosis and remedying of provisioning problems. The Joint Industry Proposal allows ILECs to report a Customer Not Ready ("CNR") code when they are unable to complete an order for reasons beyond their control. It would be helpful to have some documentation of the basis for each CNR code in the following Measurements:

- a. JIP-SA-4 - On Time Performance To FOC Due Date; and
- b. JIP-SA-5 - Days Late.

According to the Glossary in the Joint Industry Proposal, a CNR code could mean that the delay was caused by any one (or more) of the following not being ready when the ILEC was: IXC, CLEC, end user, connecting company, CPE supplier. At a minimum, each CNR code should indicate which of these entities has prevented the ILEC from completing the order.

3. Similarly, in two Measurements recommended by the Joint Industry Proposal, troubles can be excluded if not caused by the ILEC; that is, if caused by the IXC, CLEC, end user, or CPE vendor. Those Measurements are:

- a. JIP-SA-8 - New Installation Trouble Report Rate, and
- b. JIP-SA-11- Repeat Trouble Report Rate.

As in item 2, above, it would be helpful to document the basis for each such exclusion and specifically to pinpoint whether the cause of the trouble was a provider other than the ILEC, and if so, which one.

The Joint Industry Proposal is an excellent tool the Commission could use as a proxy for competition in the provision of interstate special access services. If modified as proposed above, the Proposal would directly benefit all the major groups who purchase special access from the ILECs, whether carriers or end-user customers.

CONCLUSION

The stale data relied on by the ILECs as evidence of competition in special access service markets should be discounted, particularly in light of the more recent data demonstrating that ILECs charge higher prices when they are given pricing flexibility. At most, the ILECs' stale data established only the presence of potential, not actual, competition. Intervening economic developments have delayed the day when such competition may become a reality. Until it does, the ILECs will continue to lack market incentives to be

responsive to the needs of their special access customers. Thus, the Commission should adopt regulatory incentives for ILEC improvement in their provisioning practices, which could take the form of the Joint Industry Proposal, modified as proposed herein.

Respectfully submitted,

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USERS COMMITTEE

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APPENDIX 1

CLEC Market Capitalization Levels Have Plummeted Over the Last Two Years

Company Name	9/30/99 stock price	9/30/1999 shares outstanding	9/30/99 Market Capitalization	1/30/02 stock price	01/30/02 Shares Outstanding	01/30/02 Market Capitalization	% change from 9/99 to 1/02
Adelphia	\$28.00	51,416,867	\$1,439,672,276.00	\$ 0.13	\$ 134,500,000	\$ 18,000,000	-99%
Allegiance	\$63.00	64,864,835	\$4,086,484,605.00	\$ 5.60	\$ 115,200,000	\$ 731,800,000	-82%
AT&T Corp	\$47.44	3,195,633,438	\$151,592,861,215.13	\$ 16.86	\$ 3,540,000,000	\$ 63,000,000,000	-58%
Commonwealth Tele	\$44.00	22,108,402	\$972,769,688.00	\$ 40.51	\$ 23,400,000	\$ 959,300,000	-1%
Connectiv	\$19.63	87,265,013	\$1,712,575,880.13	\$ 24.65	\$ 88,700,000	\$ 2,190,000,000	28%
CoreCom	\$37.19	72,052,000	\$2,679,433,750.00	\$ 0.11	\$ 98,400,000	\$ 10,800,000	-100%
CTC Communications	\$16.44	14,554,804	\$239,244,590.75	\$ 4.45	\$ 27,100,000	\$ 121,100,000	-49%
CTCI	\$47.00	19,925,327	\$936,490,369.00	\$ 16.00	\$ 18,800,000	\$ 300,600,000	-68%
Intermedia	\$25.00	50,985,452	\$1,274,636,300.00		Acquired by WorldCom		-100%
Focal	\$23.94	60,646,138	\$1,451,716,928.38	\$ 0.41	\$ 171,300,000	\$ 77,100,000	-95%
Global Crossing	\$26.50	794,770,468	\$21,061,417,402.00	\$ 0.30	\$ 888,600,000	\$ 453,200,000	-98%
GST Telecomm Inc	\$7.03	37,714,059	\$265,176,977.34		ch 11		-100%
Northpoint	\$24.31	125,241,738	\$3,044,877,134.26		ch 11		-100%
ICG Communications	\$15.56	47,342,835	\$736,772,869.69		ch 11		-100%
Level 3 Communications	\$52.22	341,076,021	\$17,810,580,525.39	\$ 2.85	\$ 382,900,000	\$ 1,510,000,000	-92%
Worldcom	\$76.88	1,880,219,054	\$144,541,839,776.25	\$ 9.00	\$ 2,960,000,000	\$ 30,800,000,000	-79%
RCN	\$49.69	76,184,604	\$3,785,422,511.25	\$ 2.01	\$ 97,300,000	\$ 213,500,000	-94%
Sprint	\$54.25	785,205,312	\$42,597,388,176.00	\$ 17.15	\$ 973,400,000	\$ 17,600,000,000	-59%
Time Warner	\$21.38	81,250,000	\$1,736,718,750.00	\$ 12.84	\$ 114,400,000	\$ 1,600,000,000	-8%
Winstar Comm Inc	\$39.06	54,934,842	\$2,145,892,265.63		Acquired by IDT Corp.		-100%
XO Comm/Nextel	\$61.38	315,451,507	\$19,360,836,242.13	\$ 0.13	\$ 434,800,000	\$ 60,400,000	-100%
Total CLEC			\$ 423,472,808,232			\$ 119,645,800,000	-72%

Source: carrier 10Q reports from [www. TheDigest.com](http://www.TheDigest.com)

Certificate of Service

I, Michaelleen Williams, hereby certify that true and correct copies of the preceding Reply Comments of Ad Hoc Telecommunications Users Committee was served this 12th day of February, 2002 via the FCC's ECFS system, and by first class mail upon the following:

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February 12, 2002

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